PRIVY COUNCIL.

P. C.*
1889.
July 25, 26, 27, *and* 30.
November 9.

MAHOMED AHSANULLA CHOWDHRY (PLAINTIFF) *v.* AMARCHAND KUNDU AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Calcutta.]

Mahomedan Law—Endowment—An appropriation not within the principle of wakf—Property settled on members of grantor's family with a charge upon it for religious and charitable purposes—Effect of appropriation where the charge was not a substantial one.

Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constituted *wakf*, yet in order to render it *wakf* the property must have been substantially, and not merely colourably, dedicated to such purposes.

Although an instrument purporting to dedicate property as "*fisabilillah wakf*," and vesting it in members of the grantor's family in succession, "to carry on the affairs in connection with the *wakf*," might include provisions for the benefit of the grantor's family without its operation as a *wakf* being annulled, yet, on the other hand, it would not operate to establish *wakf*, as it did not devote a substantial part of the property to religious or charitable purposes.

Without determining how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character as establishing *wakf*, the Committee approved the decision in *Muzhurool Huq* v. *Puhraj Dilurey Mohapattur* (1) to the effect that the mere charge upon the profits of the estates of certain items which must in the course of time have ceased, being for the benefit of one family, did not render an endowment invalid as a *wakf*.

In the present case, however, there being no authority for holding a gift to be good as a *wakf* without there being a substantial dedication of the property to charitable or religious uses at some time or other; and the uses prescribed involving only an outlay suitable for such a family to make in charity, the gift was held not to be a substantial, or *bonâ fide*, dedication of the property as *wakf*. The use of this expression, and others, being only to cover arrangements for the benefit of the family and to make their property inalienable, the property was not constituted *wakf*, nor was it freed from liability to attachment in execution of a decree against one of the grantees.

* *Present*: LORD WATSON, LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

(1) 13 W. R., 235.

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APPEAL from a decree (11th May 1885) of the High Court, reversing a decree (26th July 1883) of the Subordinate Judge of zilla Chittagong.

The question now raised was whether a valid dedication had been effected by the plaintiff's father by an instrument which he executed on the 5th December 1864 of land in Chittagong, so as to constitute it *wakf*, or whether the instrument, though nominally dedicating property to religious and charitable purposes, established only a charge on the property in the hands of the members of the grantor's family, the property remaining liable to attachment in execution of a decree against one of them.

The suit, in which the present appellant sued as *mutwali* of *wakf*, or dedicated, property, was brought to obtain a declaration that four *taluqs* in the Chittagong district, which had been attached by Krishnadas Kundu in execution of a money decree against Shaikh Mahomed Rahimula Chowdhry, brother of the plaintiff, had been made *wakf* by their father, and were consequently not liable to be attached in execution. Rahimula had been joined with Krishnadas Kundu as defendant. Ahsanulla alleged that Ahmedulla Chowdhry, their father, who died in 1866, had executed the above-mentioned deed of 5th December 1864, by which he purported to dedicate all his property, moveable and immoveable, in the Chittagong district as "*fisabilillah wakf*," for defraying the expense of a *musjid* at his family dwelling-house, and of two *madrassas* at Chittagong, also of lodging strangers; and also had provided for the superintendence of this endowment by his two sons.

The principal clauses are set forth in their Lordships' judgment.

Krishnadas Kundu being now dead, he was represented by the respondents Amarchand Kundu and others.

Part of the property dealt with having been attached by Krishnadas in execution of a decree which he held against Rahimula, an application was made by Ahsanulla under section 278, Civil Procedure Code, for its release. This was refused on the 31st December 1881 by the Subordinate Judge, who, after considering the terms of the deed of 5th December 1864, and the absence of any directions fixing what share of the income of the property, then said to

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amount to Rs. 17,000 annually, was to be appropriated to religious and charitable purposes; and after referring to the condition of the *musjid* and *madrassas*, made the following order:—"It appears to me as very probable from the aforesaid circumstances that the real object of the appropriator was neither religion nor charity, but the perpetuation of the properties in his family, so that his male descendants may enjoy their profits without alienating it to strangers. That the appropriator had such an intention in view may also be gathered from the provision in the 5th paragraph of the deed, by which he tried to restrict even the power of the so-called *mutwalis* to sell or mortgage the allowances granted to them. I do not think a Mahomedan can lawfully make such a disposition of his property under the disguise of a *wakf*, and it appears to me that the disposition is invalid. The claim is dismissed accordingly with costs."

This suit was then, under section 283, Civil Procedure Code, instituted to have the above order set aside, and to have it declared that the property had been validly dedicated, and made *wakf*, so that it was not liable to attachment. The plaintiff alleged that he and his brother were only salaried servants, having no ownership in the property. The Subordinate Judge considered that the validity of the instrument of 5th December 1864 had been established, and that the property was *wakf* and inalienable. He made a decree in favour of the plaintiff to that effect.

On an appeal by the defendant to the High Court, a division bench (MACDONELL and MACPHERSON, JJ.) gave the following judgment:—

"The only question which we have to consider is, whether the *wakfnama*, upon which the plaintiff relies, makes the *talugs*, which are the subject of this suit, valid *wakf* under the Mahomedan law. These are not the only properties affected by the deed, for the maker professed to appropriate his entire properties, moveable and immoveable, as *wakf*. The plaintiff has carefully withheld all evidence of the income of the properties so dealt with; but he admits that the annual profit derived from them was Rs. 12,000 or Rs. 13,000, though he says that it has become less since the inundation. We think that there is every reason to believe that it is much more than that sum.

"If the first clause of the deed stood alone there would be a valid dedication, for the properties are dedicated as *wakf* for defraying the

expenses of the brick-built *musjid* at the dedicator's family dwelling-house, and of the two *madrassas* at his ancestral homestead and his lodging-house in the town of Chittagong and for '*sadir warid*.' This would, as far as words go, sufficiently satisfy the requirements of Mahomedan law according to the strictest construction which has been put upon it by the courts in this country. But the dedication is qualified by the words 'in the manner provided in the paragraphs mentioned below.' These paragraphs, which are thirteen in number, contain only one short allusion to the object of the endowment. This is to be found in the second paragraph where the *mutwali* is directed to 'continue to perform the stated religious works according to custom.' The whole of the rest of the deed consists of minute provisions for the management of the property, the appointment of his three sons as *mutwali* and *naib-mutwalis*, the succession to those offices which are to be filled by the sons of the *mutwalis*, or, in their default, by 'sons born of the same family in nearest descent,' and for the maintenance and support of all other members of the family. The *mutwalis* are to get salaries of Rs. 100, 90 and 80 a month, respectively. If the sons of the *mutwalis* exceed three in number, the *mutwalis* can give to those who cannot get one of the three appointments any monthly allowance they like. Provision is also made for wives and daughters, and for birth, marriage, and funeral expenses of both sons and daughters. Lastly, it is left to the *mutwalis* to increase their own salaries or those of other salaried persons, having regard to the income and expenditure of the *wakf* properties. The only provisions regarding a surplus are contained in paragraphs 2 and 4, which direct that the surplus after meeting all the expenses is to be kept in a safe place under the supervision and management of all the *mutwalis*, and that all properties acquired out of this surplus are to be part of the *wakf* properties.

"The effect, therefore, of the deed as a whole is, that, while it professes to dedicate as *wakf* properties bringing in a very large annual income, it leaves it to the members of the family, who are as *mutwalis* to retain the control and management, to spend as little as they like beyond what is customary on the objects of the endowment, and to take as much as they like for themselves and the members of the family for all time on account of salary as maintenance. There is nothing whatever in the deed to indicate that the dedicator contemplated any increased expenditure in maintaining the *musjid*, *madrassas* and *sadir warid*. The maintenance of the members of the family, however numerous, is well provided for; but the stated religious works are to be performed according to custom. It is quite clear that the customary mode of performing them would involve an expenditure which in no way approached the annual income, and that there would remain a large annual surplus, which would be entirely at the disposal of the *mutwalis*, and from which all the members of the family would have to be maintained.

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"Although, therefore, the deed nominally dedicates the properties for purposes in themselves good and valid according to Mahomedan law, the dedication clause is subject to the subsequent provisions; and these, while giving the smallest possible prominence to the objects of the endowment, and limiting, as we should construe the deed, the expenditure on them, would operate to create a perpetuity for the benefit of the members of the family, and at the same time place the properties beyond the reach of the law. That this was the object of the dedicator there can, we think, from the terms of the deed, be little doubt.

"On a proper construction of the whole deed it seems to us that though all the properties are nominally made *wakf* for proper and legitimate objects, there is a surplus which is to be enjoyed by the members of the family, and as to which there is no ultimate trust in favour of any pious or charitable purpose.

"It has been argued that a settlement of this nature is recognized by Mahomedan law, and that a person can make a *wakf* in favour of himself, his children and children's children, &c. The Subordinate Judge appears to have adopted this view, and has cited in support of it certain passages from Baillie's Mahomedan Law and the case of *Luchmiput Singh* v. *Amir Alum* (1), decided by Tottenham and Bose, JJ. It seems to us unnecessary to go into the point, because the settlement as made is not one of that character. If the properties had been made *wakf* in favour of the founder's children and children's children with an ultimate trust in favour of the poor and needy, we should undoubtedly have had to consider whether such settlement created a valid *wakf*. The decision of Norris and Tottenham, JJ., in *Hamidulla Khan* v. *Lutful Huq* (2) renders it extremely doubtful whether it would be valid. It was not considered so in that case. Here the dedication purports to be for religious and charitable purposes alone, and we have only to see whether this was the real intention of the donor and whether the deed as a whole supports such a dedication. It is clear that a person cannot do indirectly that which he cannot do directly. But putting this consideration aside, if the dedication in part fails as regards the avowed objects for which it was made, we are not, we think, bound to consider whether it will hold good as regards other objects for which there was no express dedication. It is clear that it was not the intention that in this case anything like the income should be spent on the objects designated, and I think the settlement should only hold good to the extent of the intention of the donor as regards the special objects in support of which the settlement was made.

"In the case referred to as decided by Tottenham and Bose, JJ., it was held that the objects of the *wakf* being religious and charitable, the dedication

(1) I. L. R., 9 Calc., 176.
(2) I. L. R., 6 Calc., 744.

was complete, and that a subsequent direction that the manager should maintain the future male descendants of the maker of the *wakf*, did not necessarily alter its character. It was not decided whether such a direction could be lawfully carried out. That was a conclusion arrived at on the construction of the particular deed propounded in that case, and we must suppose that there was found to be an intention to create a *bonâ fide wakf* of all the properties, though this was coupled with a condition which might or might not be enforceable. Here, we think, there was no such *bonâ fide* intention as regards all the properties, and we should only give effect to the intention so far as it existed.

"We hold then that the deed, construed as a whole, did not create a valid and entire *wakf* of these properties, and that consequently the plaintiff is not entitled to get the properties released from attachment as *wakf*. It did, however, create a charge on the properties for the maintenance and support in the customary manner of the objects designated in the opening clause of the deed. We cannot, however, determine in this case what that charge is, in what proportion it should be borne by the different properties affected, or what part of the properties should be set aside to meet it, as this case relates to only a few of the properties subjected to the charge.

"The plaintiff's claim, so far as it seeks to get the properties declared to be *wakf* and to get them released from attachment as such, must be dismissed, and in lieu of the decree of the Subordinate Judge, there will be a decree to the effect that the properties in suit are subject to the charge specified above, the extent of which has yet to be determined. The appellant will get his costs in both courts."

From this decision the plaintiff appealed.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellant, argued that the instrument of 5th December 1864 had not been correctly construed with reference to the law of *wakf*, and had not received its due effect in the judgment of the High Court. An appropriation for religious or charitable purposes gave to the estate the quality of *wakf* of which it was not deprived merely by reason of the reservation of part for the maintenance of the donor's family. A *wakf* might lawfully contain provisions for the benefit of the grantor's family. Moreover, the law contemplated the payment of the *mutwali*, or superintendent, and trustee. The appointment of some one to take charge of the property appropriated was essential, and he was entitled to participate in the benefit of the appropriation. They referred to—

Baillie's Digest of Muhammadan Law, Hanifeea, Chapter IX;

Hamilton's Hedaya, vol. II, of *Wakf*;

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Macnaghten's Principles and Precedents of Muhammadan Law, Endowments, case VIII.

Appropriations, in the nature of settlements of property upon descendants, had been treated as appropriations under the name of *wakf*, where there was the use of that term, and an ultimate trust for the poor. The legal effect of *wakf* was said to be an abatement of the appropriator's right of property; but it was consistent with a detaining of it in his ownership, without the power of alienation; and the poor were deemed to be an inextinguishable class of beneficiaries. The establishment of a *wakf* might be inferred from the general character of a grant; *Kulb Ali Hossein* v. *Syf Ali* (1), *Jan Bibee* v. *Abdoolah* (2), *Jiwan Das Sahoo* v. *Shaik Kubeer-ooddeen* (3). They also referred to Mr. Amir Ali's Tagore lectures for 1884, lecture IX, section II, and to lecture X.

Luchmiput Singh v. *Amir Alum* (4) showed that, notwithstanding provisions for debts and maintenance, a *wakf* was valid. And, although it was questioned, in *Phate Saheb Bibi* v. *Damodar Premji* (5), whether a *wakf* could be created merely for the purpose of conferring a perpetual estate on a particular family, without any ultimate use to the poor, it was afterwards decided that, if the condition of an ultimate dedication to a pious and unfailing purpose had been satisfied, a *wakf* was not invalidated by an intermediate settlement on the founder's children, and their descendants, in *Fatma Bibi* v. *The Advocate-General of Bombay* (6). They also referred to *Mahomed Hamidulla Khan* v. *Lutful Huq* (7) and to *Abdul Gunne Kasam* v. *Hossein Mirza Rahimtulla* (8). Although there might be no trace in these cases that a man's mere gift to his own family was in itself a pious use, yet the ultimate trust for religious, or charitable, objects, or for the poor generally, was in itself a pious use. And there was a discretionary power to the *mutwali* to allow what might be suitable to maintain the family.

(1) 1 Select Rep., 110.
(2) Fulton, 345.
(3) 2 Moore's I. A., 390.
(4) I. L. R., 9 Calc., 176.
(5) I. L. R., 3 Bom., 84.
(6) I. L. R., 6 Bom., 42.
(7) I. L. R., 6 Calc., 744.
(8) 10 Bom. H. C., 7.

They also referred to *Doyal Chand Mulliek* v. *Saiyud Keramut Ali* (1), *Amritlal Kalidas* v. *Shaik Hossein* (2), *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (3), *Bischenchand Basawat* v. *Nadir Hossein* (4).

Under another system of law, the principle being apparently applicable to all, provisions inconsistent with the trust, which a will established for pious purposes, were rejected—see *Aushotosh Dutt* v. *Durgachurn Chatterjee* (5).

The decision of the High Court that the charge on the properties for the maintenance and support of the charitable objects, designated in the opening clause, had been created, and yet that the properties were not constituted *wakf*, was inconsistent with the course of decision of the courts.

Reference was also made to *Kuneez Fatima* v. *Saheba Jan* (6).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, argued that the deed of 1864 did not validly and effectually dedicate the property in question, so as to constitute it *wakf*. It appeared from the deed itself, as well as from the evidence as to the subsequent dealing with the property, that there had been nothing more than an attempt to create, under colour of a *wakf*, a perpetuity for the benefit of the family of Ahmedulla Chowdhry. The trusts declared were far from absorbing a substantial part of the properties. As to the document, it was insufficient that there should only be an insertion of the term *wakf*: there must be a clear intention shown to devote to religious or charitable purposes; and, instead of this intention being shown, the question arose whether the primary object was of that character at all. The real purpose in view was to provide for the family, and only a small part of the estate was to be applied to the charity. They referred to the Tagore Lectures, 1884, p. 230, comparing an expression of opinion therein with what was said by West, J., in *Fatma Bibi* v. *The Advocate-General of Bombay* (7). They also cited *Khaja Hossein Ali* v. *Shahzada Hasara Begum* (8), *Futtoo Bibi* v. *Bhurrut Lal Bhukat* (9), Baillie's Digest, 557,

(1) 16 W. R., 116.
(2) I. L. R., 11 Bom., 492.
(3) 13 W. R., 235.
(4) I. L. R., 15 Calc., 329; L. R., 15 I. A., 1.
(5) I. L. R., 5 Calc., 438.
(6) 8 W. R., 313.
(7) I. L. R., 6 Bom., 42.
(8) 12 W. R., 344.
(9) 10 W. R., 299.

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Hedaya, II, 349. They distinguished the case in which the judgment was given by Kemp, J., *Mushurool Huq* v. *Puhraj Ditarey Mohapattur* (1).

Mr. *R. V. Doyne* replied, referring to Macnaghten's Principles and Precedents, as giving all the true conditions of *wakf*, and contending that they were satisfied in this case.

Afterwards, on 9th November 1889, their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiff in this suit, who is also the appellant, is one of the sons of Sheik Ahmedulla Chowdhry; the second defendant is another son; the first defendant is a judgment-creditor of the second defendant, and in that character obtained an attachment against the property now in dispute. The plaintiff contends that the property is *wakf* and that he is the *mutwali* and that his brother has no interest therein which can be taken in execution. He accordingly made a claim in the execution proceedings which on the 31st December 1881 was rejected by the Court on the ground that no genuine *wakf* had been created.

The plaintiff then brought the present suit. In his plaint he states that the properties mentioned in the schedule were owned by his father Ahmedulla; that Ahmedulla by a *wakfnama* of the 5th December 1864 made a *wakf* of them, which ever since has continued in force; and that he and his brother are simply salaried servants, for the purpose of performing the work specified in the *wakfnama*. He prays for a declaration that the specified properties are *wakf*, and that the order of the 31st December 1881 may be set aside.

The only substantial issue throughout the litigation has been whether the intention of the deed of 5th December 1864 was to turn the properties in question into *wakf* property. If it was, the plaintiff is entitled to succeed; and if not, he must fail. The Subordinate Judge decided in his favour. On appeal the High Court thought that the intention of the deed was not to create an entire *wakf* of the properties, but only to create a charge on them for the maintenance in the customary manner of objects designated in the opening clause of the deed. They reversed the decree of

(1) 13 W. R., 235.

the Lower Court, dismissed the suit so far as it seeks to have the properties declared *wakf* and released from attachment, and declared "that the said properties are subject to the charge (the extent whereof has to be hereafter determined) specified in paragraph 1 of the *wakfnama* dated the 5th December 1864, that is to say, of defraying the expenses, in the customary manner, of the brick-built *musjid* of Jorip Mahomed Chowdhry in Paragulpore, and of two *madrassas* and *sadir warid* (travellers) as mentioned in the said clause."

From that decree the plaintiff appeals, and his appeal must be decided entirely by the construction put upon the deed.

At the outset of the deed the grantor adverts to his age and his coming death, and says—"I hereby appropriate and dedicate as '*fisabilillah wakf*,' in the manner provided in the paragraphs mentioned below,"—the properties now in question and other property there described,—" for defraying the expenses of the brick-built *musjid* of my grandfather Jorip Mahomed Chowdhry at my own family dwelling-house in the village of Paragulpore, and of the two *madrassas* at my own ancestral homestead, and my lodging house in the town of Chittagong and *sadir warid* (persons coming and going), and I pray to God that he may in his mercy accept and preserve the same for ever for being applied to those purposes."

The "paragraphs mentioned below" are 13 in number.

Paragraph 1 appoints the grantor's three sons to be *mutwalis* of the *wakf* properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

Paragraph 2 runs as follows :—

"The *mutwali*, after payment of the proper expenses of the *mosaref* and the necessary costs of collections of the zemindari and the salaries of mookhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurrence of any peril or emergency, out of all kinds of income and profits of the endowed properties according to the long standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the *naib-mutwali* and *naib-ul-maniab* and my daughters as specified in the schedule, and continue to perform the stated religious works

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according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the *mosaref*, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place, under the supervision and management of all the three persons."

The schedule provides Rs. 100 per month for the first *mutwali*, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

Paragraph 3 provides for the succession of *mutwalis* in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed it is sufficient for their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as *mutwalis*, to be appointed either by existing *mutwalis*, or by a committee or by an officer of Government.

Paragraph 4 provides for the addition to the *wakf* of surpluses occurring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that, if "the *mutwalis*" have sons exceeding three in number, for those who are not *mutwalis* the *mutwalis* shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades, or service; but when any one becomes a *mutwali* he is to bring into the *wakf* all the property he has got.

Paragraph 8 provides that if "any one" dies leaving no sons, his wife and daughter shall receive allowances. It then continues—"It shall be competent to the *mutwalis*, having regard to the income and expenditure of the *wakf* properties, to proportionately increase or decrease these allowances as well as their own salaries, and those of other salaried persons, and no one shall be able to raise any objections to the same."

The other paragraphs have no material bearing on the present question.

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The case has been very elaborately argued at the Bar, and numerous text-books and decisions have been cited: on the plaintiff's side to show that a *wakf* may lawfullly embrace provisions for the family of the grantor; and on the defendant's side to show that there can be no *wakf* unless the whole property is substantially and primarily dedicated to charitable uses.

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

On the one hand their Lorships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (1). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says:—"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law."

On the other hand, they have not been referred to, nor can they find, any authority showing that, according to Mahomedan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the Tagore Lectures delivered in 1884 by a learned Mahomedan

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lawyer (see p. 230). But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length; and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

The leading clause of the deed contains no charitable gift except "in the manner provided by the paragraphs mentioned below," and we must search those paragraphs to find the real nature of the gift. Now as regards the grantor's moveable property he was advised that there would be legal difficulty if he did not then define the objects on which it was to be spent. So he expressly mentions that it is to be spent in pious and virtuous works, and it is not necessary to decide whether the terms which he uses constitute a separate absolute gift to such purposes, or are controlled by the other paragraphs. As regards the immoveables he uses different language; and the only direction creating a trust for the objects mentioned in the opening sentence is that which is contained in the second paragraph. That trust is (after payment of '*mosaref*,' expenses, and salaries) "to perform the stated religious works according to custom."

There is a great deal in the deed which is designed for the aggrandisement of the family property, and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4; the attempt to save salaries from alienations and from creditors in paragraph 5; the provisions for appointment of male issue as *mutwalis* in paragraph 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paragraphs 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new *mutwalis* should bring all their private acquisitions into settlement;—all these things point to the same end, the increase of property available for the family. In paragraph 8 the grantor allows increases of salaries and allowances to members of the family, so that as the property increases, the family may grow richer. There is not a word said about increasing the amount spent

on charitable uses beyond the expenditure which was according to custom. Their Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

If indeed it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court, in the execution proceedings, considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes that it was much more than he represented. For all that appears there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend in that way.

Under these circumstances their Lordships agree with the High Court that the gift in question is not a *bonâ fide* dedication of the property, and that the use of the expressions "*fisabilillah wakf*," and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

The result is that in their judgment this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

C. B.